

# **BACKGROUND PAPER FOR The Department of Consumer Affairs**

**Oversight Hearing, March 5, 2018, Senate Committee on  
Business, Professions and Economic Development and the Assembly  
Committee on Business and Professions**

## **IDENTIFIED ISSUES, BACKGROUND AND RECOMMENDATIONS REGARDING THE DEPARTMENT OF CONSUMER AFFAIRS**

### **BRIEF OVERVIEW OF THE DEPARTMENT OF CONSUMER AFFAIRS**

The Department of Consumer Affairs (DCA) is one of nine agencies operating under the direction of the Business, Consumer Services and Housing Agency. DCA notes in its *Who We Are and What We Do* booklet that California's commitment to protecting consumers began with the passage of the Medical Practice Act of 1876 which was designed to regulate the state's medical professionals who had operated virtually unchecked. Additional professions and vocations were brought under state authority over the following 30 years so that by the late 1920s, the Department of Vocational and Professional Standards was responsible for licensing or certifying accountants, architects, barbers, cosmetologists, dentists, embalmers, optometrists, pharmacists, physicians, and veterinarians. The Consumer Affairs Act was passed in 1970, giving the DCA its current name. Today, DCA issues almost 3 million licenses, certificates, and approvals to individuals and businesses in over 250 categories. This involves setting the qualifications and levels of competency for the professionals regulated by the Department's boards and bureaus which license, register, or certify practitioners; investigate complaints; and discipline violators. Fees paid by DCA licensees fund DCA operations almost exclusively. The mission of the DCA, as stated in its 2017 Annual Report, is:

*To protect California consumers by providing a safe and fair marketplace through oversight, enforcement and licensure of professions.*

Within the DCA are 38 entities, including 26 boards, eight bureaus, two committees, one program, and one commission (hereafter "boards" unless otherwise noted). Collectively, these boards regulate more than 100 types of businesses and 200 different industries and professions. As regulators, these boards perform two primary functions:

- Licensing—which entails ensuring only those who meet minimum standards are issued a license to practice, and
- Enforcement—which entails investigation of alleged violations of laws and/or regulations and taking disciplinary action, when appropriate.

DCA entities are semiautonomous regulatory bodies with the authority to set their own priorities and policies and take disciplinary action on their licensees. Board members are representatives of the public and the profession a particular board oversees. The composition of each board is outlined in statute, with members appointed by the Governor and Legislature. According to the DCA's 2016 Legislative Resource Booklet, day-to-day operations of a board are managed by an executive officer selected by the board. DCA notes that if a board has a policy issue that it wants to address, it can vote to pursue a regulatory or statutory change. Boards can directly sponsor legislation without prior approval from any other governing body, but the DCA prepares board budgets. DCA states that by nature, the operations of a board tend to be very public because all decisions are made at public meetings. DCA provides administrative support to boards through its various offices and divisions. The relationship between DCA and boards is outlined further in Issue #1 on page 7 of this Paper.

DCA has direct control and authority over bureaus. As DCA notes in its *2016 Legislative Resource Booklet*, bureaus are a direct extension of the DCA and cannot act on policy matters without first consulting with the DCA. DCA advises that policy decisions start at the bureau level but must be vetted through the DCA, California Business, Consumer Services and Housing Agency (BCSH or Agency) and the Governor's Office. According to DCA, the Director supervises and administers the acts of every bureau, but delegates the authority to a bureau chief, who then carries out the will of the Director. Policy decisions of a bureau, as part of the Department, are confidential until approved by the Administration. Bureaus may also consult with an advisory committee, typically comprised of representatives in a particular field or profession regulated by a bureau, however, these bodies have little actual power to direct or influence bureau activities and decisions. Some bureau chiefs are appointed by the Governor; others are appointed by the Director of the DCA.

The current Director of DCA is Dean Grafilo who was appointed in February 2017. Leadership at the DCA currently includes a Chief Deputy Director; Deputy Director, Legal Affairs Division; Assistant Deputy Director, Legal Affairs Division; Deputy Director, Board and Bureau Services; Deputy Director for Legislation and Regulatory Review; Deputy Director, Communications Division; Deputy Director, Administrative Services; Deputy Director, Office of Information Services; Chief, Division of Programs and Policy Review and; Chief, Division of Investigation.

### **Enforcement Overview**

Enforcement programs allow DCA entities to take action against licensees posing a threat to the public. The various practice acts governing boards and bureaus outline the functions for these regulatory bodies to investigate complaints and take disciplinary action against licensees when those licensees have engaged in activities that harm the public.

Enforcement typically begins with a complaint. Complaints are received from the public or can be generated by board and bureau staff when, through the course of their work, potential violations of a particular act are identified. Complaints are processed and either forwarded to another agency that have appropriate jurisdiction, forwarded for further investigation or closed and considered resolved. Complaints are generally kept confidential and specific information contained in a complaint is not made public during the investigation process. DCA issued Complaint Prioritization Guidelines for entities to utilize in prioritizing their respective complaint and investigative workloads. SB 467 (Hill, Chapter 656, Statutes of 2015) specifically required that in order to implement the Consumer Protection Enforcement Initiative of 2010, the director, through the Division of Investigation, shall implement "Complaint Prioritization Guidelines" for boards to utilize in prioritizing their respective complaint and investigative workloads. The guidelines shall be used to determine the referral of

complaints to the division and those that are retained by the health care boards for investigation. The three categories of complaint identification and prioritization are as follows:

- *Urgent* – acts that could result in serious patient harm, injury or death and involve, but are not limited to, gross negligence, incompetence, drug/alcohol abuse, practicing under the influence, theft of prescription drugs, sexual misconduct while treating a patient, physical/mental abuse, conviction of a crime etc.
- *High* – acts that involve negligence/incompetence (without serious injury), physical/mental abuse (without injury), mandatory peer review reporting, prescribing/dispensing without authority, involved in aiding and abetting unlicensed activity, complaints about licensees on probation, exam subversion, etc.
- *Routine* – complaints that involve fraud, general unprofessional conduct, unsanitary conditions, false/misleading advertising, patient abandonment, fraud, failure to release medical records, recordkeeping violations, applicant misconduct, continuing education, non-jurisdictional issues, applicant misconduct.

Investigations by board of bureau staff that determine a licensee has committed a minor violation that does not warrant formal disciplinary action against a license can result in other forms of discipline like a citation and fine. Most programs have an informal and internal process for these types of actions. Complaints warranting additional investigation are either investigated by dedicated board or bureau enforcement staff or referred to the DCA's Division of Investigation (DOI) which provides centralized investigative services for the various regulatory entities.

DOI investigators are sworn peace officers who perform a full range of peace officer duties and responsibilities, although DOI does also employ limited-term non-sworn investigators as part of a pilot project. During the course of an investigation, investigators conduct interviews, gather evidence, submit reports, and may refer cases to the office of a local District Attorney if they determine a crime has been committed. DOI is discussed further in Issue #4 on page 10 of this Paper.

Investigations that determine major violations of a practice act have been committed, or are of a serious nature in terms of the potential harm to the public by a licensee, move on for formal disciplinary action. This involves forwarding a case to the Office of the Attorney General (OAG) which acts as the attorney of record for DCA licensing entities in their administrative actions relating to a license. (Licensees of the Medical Board of California (MBC) and the boards MBC provides enforcement services to follow a process under a Vertical Enforcement and Prosecution model in which the DOI Health Quality Investigation Unit and OAG attorney work together on a case from the outset, rather than OAG waiting for referral of a case following an investigation.) OAG attorneys determine whether there is sufficient evidence for an accusation and file this legal document on behalf of their client board or bureau, outlining the charges against a licensee and the violations of a practice act a licensee is accused of. Licensees are able to dispute these charges at an administrative hearing conducted by an Administrative Law Judge (ALJ) in a setting that resembles a court trial. Many entities negotiate agreements to resolve a case before it goes to a hearing; in these instances, a licensee admits to some charges detailed in the original accusation and accepts some form of discipline for those charges rather than continue in the hearing process on all charges. ALJs write a proposed decision based on a hearing and send these to their board client who subsequently adopts, modifies or

rejects the proposed decision which can result in revocation or suspension of a license, surrendering of a license, placing the licensee on probation or other actions.

DCA has established performance measures for boards and bureaus assessing: the number of complaints received; the average number of days to complete complaint intake; the average number of days to complete the intake and investigation steps of the enforcement process for closed cases not resulting in formal discipline; the average number of days to complete the enforcement process for those cases closed at the formal discipline stage; the average cost of intake and investigation of complaints; consumer satisfaction with the service received during the enforcement process; the average number of days from the date a probation monitor is assigned to a probationer to the date the monitor makes first contact; and the average number of days from the time a violation is reported to a program, to the time the assigned probation monitor responds.

Enforcement timelines and delays in enforcement have consistently been a source of significant frustration to the public and Legislature. Entities that regulate health professions have been the focus of much of the concern, however other non-health programs under the DCA face significant delays in swift outcomes against licensees that could serve to further protect the public from harm. In 2010, DCA created the Consumer Protection Enforcement Initiative (CPEI) aimed at reducing the average length of time it takes health care boards to take formal disciplinary action, with a goal of 12 to 18 months. However, most boards are not meeting these goals and some are taking exponentially longer than this laudable timeframe and enforcement deficiencies remain troubling. CPEI and enforcement case timelines are outlined further in Issue #9 on page 21 below.

DCA's effective implementation of a dynamic information technology (IT) system for all entities remains delayed. The DCA has been working since 2009 on replacing multiple antiquated standalone IT systems with one fully integrated system. In September 2011, the DCA awarded Accenture LLC with a contract to develop and implement a commercial off-the-shelf customized IT system, which it calls BreEZe. BreEZe is intended to provide applicant tracking, licensing, renewals, enforcement, monitoring, cashiering and data management capabilities. In addition, BreEZe is web-enabled and designed to allow licensees to complete and submit applications, renewals, and the necessary fees through the internet. The goal of the system is for the public to be able to file complaints, access complaint status and check licensee information if/when the program is fully operational. BreEZe is fully operational for 17 boards and one bureau under DCA.

Release 1 went live in October 2013, serving ten programs. Release 2 went live in January 2016, serving eight programs, and Release 3 was removed from the project entirely in 2015, impacting 19 programs. According to DCA, programs that were previously scheduled for Release 3 of BreEZe will be utilizing the Department of Technology's Project Approval Lifecycle process to determine what IT solution best meets their individual business needs. DCA notes that the objective of this four-step process is to match an entity's organizational readiness and business needs with the most appropriate IT solution. DCA's expectation is that in some cases, the process will determine that BreEZe is the best solution. In other cases, such as the Bureau of Cannabis Control, a different platform may better meet the business needs. DCA advises that the resources that each of these programs has already committed to this effort will still provide value regardless of which IT solution is ultimately implemented, including staff training, documentation of business processes, and general expertise and knowledge of the process of transitioning into a new system. The Department is organizing the remaining programs into groups based on their individual readiness to move through the Department of Technology's process. DCA advises that it will update legislative staff quarterly and often times

monthly in collaboration with the Department of Technology as the remaining boards and bureaus move through the process.

(For more detailed information regarding the responsibilities, operation and functions of the DCA, please refer to the “2017 Annual Report”. This report is available on its website at [http://www.dca.ca.gov/publications/2017\\_annrpt.pdf](http://www.dca.ca.gov/publications/2017_annrpt.pdf) )

## **PRIOR SUNSET REVIEW: CHANGES AND IMPROVEMENTS**

DCA is reviewed annually through sunset review oversight by the Senate Committee on Business, Professions and Economic Development and the Assembly Committee on Business and Professions. During the 2017 review of DCA, 7 issues were raised. The following are some of the changes, enhancements and other important policy decisions or regulatory changes made pursuant to this review. For those which were not addressed and which may still be of concern to the Committees, they are addressed and more fully discussed under “Current Sunset Review Issues.”

- **DCA is continuing to monitor the issue of barriers to licensure.** Studies conducted at the federal level and recently in California by the Little Hoover Commission have focused on barriers to employment and provided suggestions as to where certain requirements for employment should be streamlined, particularly for certain populations of employees. The October 2016 Little Hoover Commission report specifically noted improvements that could be made in the information licensing entities provide applicants to ensure a smoother licensing process. Last year, the Committees asked what steps DCA is taking to respond to the report and how DCA is advising entities within the DCA on best practices to assist in the licensure process.

DCA reports that it has been working with the Business, Consumer Services, and Housing Agency to identify areas where unnecessary barriers to licensure can be reduced and notes that one key area of this work has been on the examination of possible barriers to licensure for individuals reentering the workforce after incarceration. DCA states that it has been assessing the criteria used by boards and bureaus to determine if a past conviction is substantially related, as well as how they consider rehabilitation. DCA states that clarifying criteria through regulations, through FAQs, or some combination of both could assist applicants and potentially encourage more individuals with prior convictions to apply and states that it “intends to work with the various boards and bureaus to achieve more clarity and remove unnecessary barriers to licensure. Some of the avenues the Department is exploring include: providing clear descriptions of licensing criteria on each program’s website, potentially re-drafting some regulations to create some consistency and additional clarity, and providing more hands-on guidance to licensees that inquire about these processes.” *(It would be helpful for the Committees to receive an update on the status of these efforts).*

- **DCA is continuing to review its master contract with the vendor for administration of programs operated by DCA entities which are designed to assist licensees with substance abuse issues.** During the prior review, Committee staff explored DCA’s responses to an audit of its contract with MAXIMUS for the healing arts boards that have a diversion program. Committee staff outlined challenges related to the frequency of drug testing required by Standard 4 in the DCA’s “Uniform Substance Abuse Standards” adopted pursuant to SB 1441

(Ridley-Thomas, Chapter 548, Statutes of 2008) which required the DCA to develop uniform and specific standards to be used by each healing arts board in dealing with substance-abusing licensees in 16 areas, including requirements and standards for testing and frequency of testing to detect drugs or alcohol while participating in a diversion program or on probation. DCA reports that it has initiated conversations with the participating boards to determine if a less burdensome standard could be used while maintaining the integrity of the program. *(It would be helpful for the Committees to receive an update on the status of these efforts.)*

- **DCA took steps aimed at ensuring board members are immune from antitrust liability.** In 2010, the Federal Trade Commission (FTC) brought an administrative complaint against the North Carolina State Board of Dental Examiners (Board) for excluding non-dentists from the practice of teeth whitening. The FTC alleged that the Board’s decision was anticompetitive under the FTC Act because the Board was not acting as a state agent. The Board appealed to the Supreme Court, arguing that it was acting on behalf of the government and should be afforded immunity from antitrust lawsuits. The Supreme Court ruled in the FTC’s favor, stating that regulatory bodies comprised of active market participants in the occupation regulated by that body may invoke state-action antitrust immunity only if it is subject to active supervision by the state. The Supreme Court has stated that to qualify as active supervision “the [state] supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy.” *N. Carolina State Bd.*, 135 S. Ct. at 1116.

The Committees were concerned about the impact the decision in *North Carolina State Board of Dental Examiners v. FTC* would have on California professional regulatory boards. In response to discussions in 2015 and 2016 and the 2016 sunset review oversight hearing DCA participated in, DCA assisted in coming up with a legislative solution to the issue of active supervision. Specifically, SB 1195 (Hill) would have established active supervision by building upon the current authority of the Director of DCA to review certain board decisions unrelated to disciplinary action. The bill would have also ensured that DCA board members are not personally liable in the event they are sued in an antitrust matter related to their board service.

DCA advised the Committees in 2016 that it proactively provided training and guidance to boards and entities regarding best practices, including: advising that entities continue to promote their primary mission of consumer protection; advising that entities identify when market-sensitive decisions are being made; advising that entities conduct an analysis of the competitive aspects of decisions and; advising that entities use current applicable state processes (which contain elements of state supervision), among other efforts. Information about the North Carolina case has been incorporated into quarterly Board Member Orientation Training DCA provides and DCA has presented at many board meetings to brief members on the decision. *(It would be helpful for the Committees to receive an update on current DCA-led efforts to protect unpaid, volunteer board members from antitrust action.)*

## CURRENT SUNSET REVIEW ISSUES FOR THE DCA

The following are areas of concern for the DCA to consider, or areas of concern for the Committees to consider, along with background information regarding each particular issue. There are also recommendations the Committee staff have made regarding particular issues or problem areas which need to be addressed. The DCA has been provided with this Background Paper and is asked to respond to both the issues identified and the recommendations of the Committee staff.

**ISSUE #1: (PRO RATA). The Committees continue to be interested in exploring the manner in which the DCA programs are charged for administrative services provided by the DCA. Pro Rata charges continue to skyrocket and transparency about how costs are calculated, and what services are received for these charges, continues to be lacking. Should the Legislature require DCA to account for pro rata based on a program's actual, demonstrated usage of centralized DCA services received?**

**Background:** *Pro Rata Charges to Boards Generally.* DCA's brochure *Who We Are and What We Do* states that boards operate independently and only rely on DCA for administrative support. However, that is not the full story.

DCA is 99% funded by a portion of the licensing fees paid by California's state-regulated professionals in the form of "pro rata." Pro rata funds DCA's two divisions, the Consumer and Client Services Division (CCSD) and the DOI. CCSD is the primary focus of this issue and contains the Administrative and Information Services Division (the Executive Office, Legislation, Budgets, Human Resources, Business Services Office, Fiscal Operations, Office of Information Services, Equal Employment Office, Legal, Internal Audits, and SOLID training services), the Communications Division (Public Affairs, Publications Design and Editing, and Digital Print Services), and the Division of Program and Policy Review (Policy Review Committee, Office of Professional Examination Services, and Consumer Information Center).

Pro rata is apportioned primarily based on the number of authorized staff at each board, regardless of how much of DCA's services the boards say they use. DCA also charges boards based on actual use for some services, such as the Office of Information Services, the Consumer Information Center, the Office of Professional Examination Services, and DOI. Based on DCA's own figures, actual pro rata costs for every board have increased an average of 112% since FY 2012-2013. For example, the Physical Therapy Board of California has seen its pro rata increase 90% from \$853,000 in FY 2012-13 to \$1,621,000 in FY 17-18, and the Dental Board of California spent \$1,172,000 in FY 2012-13 and is projected to spend \$2,152,000 in FY 2017-18, an increase of 84%. While all boards show a substantial jump in costs from FY 2015-16 onward due to BreEZe, it does not explain everything.

DCA appears aware that alternative payment models would be more equitable. In response to complaints by boards and licensees that pro rata continued to climb without an increase in service levels, SB 1243 (Lieu, Chapter 395, Statutes of 2014) required DCA to study how it calculates the proration of its administrative expenses to determine whether its system is "the most productive, efficient, and cost-effective manner for the department and the agencies comprising the department." DCA was also required in the report to consider whether some of DCA's services should be outsourced or charged on an as-needed basis. DCA contracted with CPS HR Consulting (CPS) to complete this report.

The report was published in 2015. While CPS agreed that the current pro-rata calculations based primarily on position authority are efficient from the perspective of DCA management, the report advised that charging boards for services based on what they actually use would be fairer. CPS suggested four alternative approaches for calculating pro rata, three of which required the DCA to show that services a board receives are related to what DCA charges.

DCA only implemented one of the recommendations, which was to spread the cost of so-called “non-jurisdictional” requests (general consumer protection questions unrelated to any specific board or bureau) to the Consumer Information Center and Correspondence Unit based on equal shares, rather than proportionally, to the boards and bureaus most using the service, because such requests are general consumer inquiries and not fairly attributable to any one board more than another. This does not appear to have substantially impacted total pro rata costs, however. In fact, non-jurisdictional request costs were charged directly to the General Fund in previous years. DCA has yet to implement CPS’ other suggestions and appear to have no plan to do so.

*Recent CalBRE’s Experience with DCA Pro Rata Indicates Substantial Accounting Concerns.* In 2017, the Bureau of Real Estate (CalBRE) was removed from DCA’s jurisdiction pursuant to SB 173 (Dodd, Chapter 828, Statutes of 2017). CalBRE’s pro rata charges grew from \$1.8 million in 2013, when CalBRE was an independent department, to \$5.2 million in FY 2016-17 under DCA. In readjusting its pro rata calculations following CalBRE’s departure, DCA reduced its overall budget by only \$1.3 million, even though it planned to charge CalBRE \$5.7 million. Critically, if the \$5.7 million charged to CalBRE had been entirely, or even mostly, justified in service to CalBRE, then DCA should have reduced its pro rata by \$5.7 million. It appears that CalBRE may have been subsidizing services provided to other boards, in violation of current law (Business and Professions Code Section 202(a)) which prohibits the funds of one board from being used to pay the expenses of any other. LAO has recommended the Legislature require that DCA report on the reasons for the difference between the charges that have been paid by CalBRE for DCA services and the much smaller proposed reduction to DCA’s budget.

*LAO Suggests the Legislature Compel DCA to Revisit Pro Rata Charges.* This marks an ideal time to reexamine DCA’s services and charging authority. BPED Committee staff have been working with Senate Budget and Legislative Analyst Office (LAO) on pro rata issues for several years, and recent events have provided a unique opportunity to demand accountability. LAO recently recommended that the “Legislature require DCA to begin capturing data on past client usage and workload for its main service segments such as human resources, budget, training, and legislative support” by January 10, 2020. This is a critical step in assessing DCA’s value to the boards.

***Staff Recommendation:*** *DCA should capture data on past client usage and workload for its main service segments such as human resources, budget, training, and legislative support. DCA should calculate the time and funds spent on board issues in such a manner as to be directly comparable to Department of General Services’ Price Book.*

**ISSUE #2: (LEGAL SERVICES) DCA’s control of legal services is a source of frustration for many boards concerned about the lack of expertise of DCA attorneys and the inability to receive proper counsel. Some boards have statutory authority to hire attorneys and fund resources to offset costs related to hiring an attorney yet have been denied approval to do so.**

**Background:** DCA has direct control over nearly all legal services through the Legal Affairs Division (LAD), which provides in-house counsel to DCA and the boards. However, boards have recently expressed frustration at their inability to access the legal services they need in a timely manner. In addition to attorneys burdened with regulatory concerns (discussed later), boards have expressed frustration getting assistance with personnel matters, legal opinions, and other routine legal services. Boards also report that DCA has diverted attorney resources from boards for matters it deems higher priority.

To circumvent this problem, the Medical Board of California hired its own counsel, and is very satisfied with the arrangement. However, DCA has repeatedly denied requests by other boards to do the same. All boards are charged a flat rate for legal services based on how many staff they have, and a board cannot pay additional fees for more legal work even if they need it. Notably, MBC still pays \$265,000 in pro rata for legal services, which is the full amount based on their staff count. They still use LAD for certain services, but MBC has its own resource – a full time attorney, dedicated to and experienced with MBC issues, for which they pay less than the amount charged by DCA’s LAD. The Dental Board of California is similarly authorized to hire an attorney, but its requests to hire one have been denied by DCA.

Several other boards have recently approached the Legislature with requests for similar statutory authority to hire counsel because LAD has been inadequate for their needs. SB 547 (Hill, Chapter 429, Statutes of 2017) authorized the Board of Pharmacy and the Board of Registered Nursing to hire their own counsel. There were no objections to these issues in the bill raised by DCA or Agency, but requests from those boards to hire counsel have since been rejected, contrary to the bill’s Legislative intent. DCA will not acknowledge or explain to the Legislature why those budget change proposal requests were denied.

**Staff Recommendation:** *DCA should allow boards with the appropriate statutory authority and available resources to hire their own attorneys. DCA should explain to the Committees why it has not allowed boards to hire independent counsel.*

**ISSUE #3: (REGULATIONS) DCA’s regulatory approval process appears unique and needlessly complex. The ability for boards to promulgate regulations has come to a virtual standstill and some regulation packages pending DCA approval have been completely lost. What is the DCA’s regulatory review process and what are the anticipated and actual timelines at each stage in this process?**

**Background:** Promulgating regulations is at the heart of DCA boards’ work to implement the law and establish a framework for consumer protection. A primary reason boards are seeking independent counsel, as noted above, is that DCA added significant steps to its regulatory review process, leaving less time for counsel to work on other matters. In approximately September 2016, DCA added a “pre-review” process, which required regulations to go through DCA’s entire review process prior to the package being submitted for public comment. Board regulations (which were already drafted under the supervision of LAD) would now need to be sent to DCA’s Regulations Coordinator, LAD, DCA

Budget, back to LAD, DCA's Legislative and Regulatory Review, DCA Executive Office, Agency, DCA's Regulation Coordinator, and then back to the board— before the board submits the language for public comment, and before review by the Office of Administrative Law (OAL). The necessity of such a thorough review prior to public comment is questionable because public comment frequently results in regulatory language changes, completely obviating the preceding review. Worse, from a consumer protection standpoint, boards have indicated pre-review has added months (upwards of 10 months in the case of the Board of Pharmacy) to the time necessary to pass regulatory packages. Senate Committee staff could not find any other California governmental entity with a review process at all similar to DCA's.

Virtually every public board meeting includes an update on pending regulations. A February 2018 meeting of the Board of Behavioral Sciences (BBS) captured the impacts of the timelines outlined above. Staff presented board members with information about the status of a seemingly simple proposal to amend the BBS' advertising regulations following passage of SB 1478 (Committee on Business, Professions and Economic Development, Chapter 489, Statutes of 2016) which, among other technical changes, set forth minimum and maximum application processing time frames. BBS approved a proposal at its November 2016 board meeting. The proposal finally completed the new initial review phase process and was published in the California Regulatory Notice Register on July 7, 2017. The same proposal was submitted to DCA for final review on September 13, 2017, submitted for Agency review on January 22, 2018 and finally to the Department of Finance and OAL on February 8, 2018. This process took 19 months. In comparison, OAL has exactly 30 working days to review regulations from all California agencies. Similarly, the Board of Barbering and Cosmetology (BBC) was required to promulgate regulations to implement SB 1044 (Nguyen, Chapter 233, Statutes of 2016). That measure directed BBC to determine by regulation when a fine is required to be assessed against both the holder of the establishment license and the individual licensee for the same violation, determine by regulation when a fine shall be assessed to only the holder of the establishment license or to only an individual licensee for the same violation. The bill also authorized BBC to enter into a payment plan for citations with administrative fines exceeding \$500 and define the parameters of such a plan through regulations. BBC approved proposals for regulations at its January 22, 2017 board meeting. BBC staff provided an update to board members at its October 22, 2017 meeting that the proposals were all still under DCA pre-filing review.

DCA's General Counsel did concede that DCA needs to work on timeliness, but stated that results proved the process was working. He said in the six months before he took control of LAD, 24 regulatory packages were sent to the OAL and four were disapproved. After he took office, 24 were sent and two were disapproved, a 50% decrease.

***Staff Recommendation:*** *DCA should consult with OAL and report back on whether DCA's updated regulatory process represents the most efficient means to pass regulations, taking into consideration other similarly situated state entities. DCA should determine how long each step, and the overall regulatory process, should take and report this to the Legislature and the boards. For any regulatory package taking longer than these timelines, DCA should identify to the respective board which steps were delayed, and why. DCA should require all individuals, attorneys and non-attorneys, involved in substantive review of regulations to take OAL's 3-day regulatory class every four years and keep records of attendance.*

**ISSUE #4:** (DCA's DIVISION OF INVESTIGATION (DOI)) DOI employs sworn peace officers to conduct investigations on behalf of DCA boards and bureaus. Some programs are not required to utilize DOI and conduct their own investigations. How does DOI prioritize

**investigations, set goals for investigation timeframes and keep boards apprised of the status of investigations? What options exist for boards that may be unable to receive timely investigative services which are necessary to build cases and gather evidence the Office of the Attorney General requires in order to file accusations?**

**Background:** The DOI is a law enforcement agency that, according to its website, “protects California consumers and licensees by investigating violations of California’s laws, regulations, and professional standards”. DOI’s mission is “To provide exemplary law enforcement investigative services to protect consumers” with a vision “To be the premier law enforcement consumer protection agency”.

Established in 1961, DOI provides law enforcement investigative services for the boards, bureaus, programs, committees, and commissions within DCA. DOI states that staff members come from a variety of backgrounds and that investigators have prior experience as law enforcement detectives, sexual assault investigators, computer forensics experts, internal affairs investigators, defensive tactics instructors, medical investigators, and elder abuse experts. According to DOI, all investigators have completed a law enforcement academy certified by the California Commission on Peace Officer Standards and Training, as well as numerous advanced officer courses and specialized training and certification. All DOI peace officers are authorized to conduct criminal and administrative investigations, obtain and execute search warrants, and make arrests anywhere in California. DOI investigators use an assortment of investigative tools, including undercover operations, search warrants and subpoenas, working with allied law enforcement agencies/task forces, and computer forensics analysis.

DOI notes that investigations include:

- Prescription fraud/narcotics theft
- Unlicensed activity
- Illegal practice of medicine
- Wrongful death
- Patient abuse
- Identity theft
- Sexual misconduct
- False advertising
- Fraud
- Underground economy
- Assault
- Incompetent/negligent care

DOI has four units, the Health Quality Investigation Unit (HQIU), Investigation and Enforcement Unit (IEU), Special Operations Unit (SOU) and Cannabis Enforcement Unit (CEU). HQIU is responsible for the investigation services for the Medical Board of California and related healing art boards. HQIU has 13 field offices located in Southern California, Northern California, the Bay Area, and the Central Valley. HQIU investigators conduct investigations for the Medical Board of California, Physician Assistant Board and Board of Podiatric Medicine but not for the Osteopathic Medical Board which, like the Medical Board, oversees physicians. IEU field offices provide law enforcement investigative services for all other DCA programs. IEU has eight field offices located in Southern California, Northern California, the Bay Area, and the Central Valley. SOU provides specialized investigative

services, training, and program management within DOI and DCA. SOU is responsible for internal affairs investigations and background investigations of DOI staff and DCA when requested. SOU also oversees the Workplace Violence Prevention programs, Infraction Citation Authority Program, Criminal Offender Record Information clearance system and provides tactical training for DOI sworn staff. Cannabis Enforcement Unit (CEU) was created to provide sworn investigative services for the bureau. CEU will handle the more complex, criminal, and administrative cases while enforcing the Bureau of Cannabis Control laws and regulations that apply to all bureau licensees (distributors, home delivery, dispensaries, microbusinesses, and testing labs).

HQIU has been the source of particular Legislative focus over the past number of years. HQIU has faced significantly high vacancy rates and challenges related to the Vertical Enforcement and Prosecution model in which the investigator and OAG attorney work together on a case from the outset, rather than OAG waiting for referral of a case following an investigation.

During the 2016-2017 prior review of DCA, the Committees were interested in learning what challenges DOI faces in general, beyond HQIU challenges discussed frequently, given the key role DOI plays in effectively and swiftly collecting necessary evidence that can help boards take action to prevent dangerous licensees from interacting with the public. In response, DCA focused on efforts related to HQIU, noting that it has been successful working with OAG to make process improvements and improve communication and working relationships between staff.

It appears that DOI timeframes are incredibly long for IEU investigations. Boards have reported being advised to not even request status updates on what those boards consider high profile cases, or cases with the potential for consumer and public harm, for at least six months. This is just for status updates on cases.

There are also serious concerns about DOI's role in investigating schools and training programs under the jurisdiction of the Bureau for Private Postsecondary Education (BPPE) and those that may have BPPE approval and approval by another entity like the Board of Barbering and Cosmetology (BBC) or California Massage Therapy Council (CAMTC). In some cases, CAMTC has denied approval of a school for educational quality and other serious issues outlined in legal pleadings yet the school remains approved by BPPE. BBC has gone so far as to request sole oversight of barbering and cosmetology schools and programs in the state due to the lack of action against what BBC believes are fraudulent programs. At its February 2018 meeting, BBC staff provided another update on what it believes is clear evidence of schools simply selling hours. BBC approves schools but only has authority to inspect for health and safety violations and does not believe it has the statutory authority to inspect students. In response, BBC has sought innovative solutions to address the problem of selling of hours which it reports has increased to alarming numbers. BBC outlined one school that has 20 hair stations, 10 manicuring stations and 5 foot basins. 149 applicants for an esthetician license reported completion of training from that school, a number BBC believes is near impossible given the small space and limited equipment. BBC reported around 30 schools that show similar issues. BBC staff visited a number of schools and found what appear to be evidence of fraudulent program operation including a complete lack of tracking student hours, a complete lack of beautification products necessary for training, an inability of school personnel to report the number of students enrolled in a program, a complete lack of lesson plans, an inability of school employees to state the tuition and costs for a program and significantly the ability of any person to simply take readily available Proof of Training documents (POTs). These POTs show BBC when students begin a program and when they complete a program and are a key component of licensure by BBC. It is unclear whether BPPE and/or DOI have conducted investigations to determine whether potentially fraudulent schools are violating

the Private Postsecondary Education Act and where action should be taken against the approval to operate those programs. It is also unclear whether BBC efforts will suffice for purposes of an accusation and it whether DOI is working in coordination with programs that clearly need formal investigative services to take important enforcement action.

**Staff Recommendation:** *As requested during the prior sunset review, DCA should advise the Committees of the vacancy rate for investigators not assigned to the HQIU and should provide information about barriers to DOI having the necessary staff to carry out investigations. The DCA should inform the Committees about steps the Legislature and the DCA can take to ensure that properly trained personnel are in place to conduct critical enforcement investigations. DCA should update the Committees on options boards have to utilize non-DOI staff, such as the Contractors State License Board having authority to hire its own investigators, and what models are under review to allow boards to quickly gain the evidence and information necessary to pursue enforcement against a license.*

**ISSUE #5: (FUND MONITORING AND BUDGETS)** Boards and board staff maintain ultimate responsibility for approving budgets and monitoring expenditures and revenues yet receive information to do so from the DCA's budget office. How does DCA monitor board funds? How does DCA anticipate fund condition problems and the potential need for increased revenues? How does DCA communicate with EOs about their budgets? Has FISCAL impacted the ability of boards to maintain up-to-date information about their funds?

**Background:** Board Executive Officers (EOs) rely on information from DCA's Office of Administrative Services, which consists of Fiscal Operations (Budgets, Accounting, Cashiering), Business Services Office and the Office of Human Resources to do one of the most critical components of their job – managing the fiscal and fund condition of the board. Budget numbers are reported to board members at virtually every board meeting at the very least, while some boards provide more regular updates on the status of their budget. Yet boards may not have full control of establishing budgets and rely instead on budgets provided to staff by the DCA rather than the other way around. Boards work with DCA to determine when loans can be repaid, whether expenditures like office space upgrades can be repaid and other aspects of operations and should similarly receive information about the status of fund depletion and the need for fee increases and other revenue sources.

In order to track revenues and expenditures, DCA provides regular accounting updates on each fund to the board responsible for maintaining that fund. What used to be frequent reporting now appears to have been delayed significantly by the new FISCAL system which aims to replace dozens of separate, legacy accounting systems used by different government departments with a single program to provide the state with more a more accurate picture of its finances.

It would be helpful for the Committees to understand how its Fiscal Operations unit works with boards to ensure the appropriateness of expenditures and the availability of resources. It would be helpful for the Committees to understand how DCA makes boards – members and executive leadership – aware of potential fund problems and how DCA supports boards' in obtaining increased revenues like additional fees.

**Staff Recommendation:** *DCA should provide an update to the Committees on the work its Fiscal Operations staff does to assist boards in proper accounting and budgeting. DCA should advise the*

*Committees how it determines a particular fund may be nearing the point of depletion and how it supports boards in obtaining additional resources like fee increases, when necessary. DCA should update the Committees on the impacts of FISCAL in timely accounting. DCA should explain how it advises boards on major expenditures like loan repayments or pro rata charges and how it projects impacts of expenditures on funds administered by DCA programs.*

**ISSUE #6: (EXECUTIVE OFFICER PAY AND RETENTION EFFORTS) Executive Officers (EOs) oversee board day-to-day functions, operations and management of staff. Many boards have sought to increase EO salaries but have been denied. What role does DCA play in supporting board efforts to compensate and retain high quality EOs?**

**Background:** EOs are the most critical program staff, responsible for managing boards, monitoring fund conditions, making critical enforcement decisions, overseeing and guiding staff and myriad responsibilities necessary for a board to fulfill its consumer protection mission and comply with the statutes governing its work. Most EOs are appointed by a board, while a handful of appointments are approved directly by the Director of DCA. While EOs work under the direction of board members, DCA outlines the process for EO recruitment, hiring and ongoing review.

Boards regularly vote to approve salary increases for EOs and are frequently denied further approval for the amounts they decide on. According to testimony provided at a July 2017 meeting of the Board of Pharmacy (BOP) by staff from the DCA personnel office, the process for increasing the salary category for the EO position includes the DCA which facilitates a request and guides the process by the ultimate decision for a salary or increasing a current board's EO salary from one range to a higher one lies within the Administration. DCA staff noted the following current ranges for EOs:

- G = \$10,054 - \$11,200
- F = \$10,320 - \$11,498
- E = \$10,545 - \$11,746
- D = \$10,925 - \$12,168
- C(1) = \$11,071 - \$12,335
- C(2) = \$11,425 - \$12,726
- B = \$11,952 - \$13,316 (this level is usually reserved for Department Directors)

In 2011, DCA staff reported at multiple board meetings that it receives several EO salary increase requests. DCA staff advised that these requests must be approved by the Department of Personnel Administration (DPA) and the Governor's Office. In an effort to ensure that all board EO's salaries are reviewed to determine if the position is at the appropriate salary level, DCA staff advised that the Department had entered into a contract to review all EO salaries. Staff advised in 2011 that until the study was complete, the DCA would not move forward with EO salary increases.

The final *California Department of Consumer Affairs Board Executive Officer Salary Assessment Study*, conducted by CPS HR Consulting, was provided to DCA in 2012. The report compared board EOs to both other state employees as well as to each other. It noted that EOs are more like Assistant Department Directors or Division Chiefs than Directors of departments because EOs are delegated responsibility for implementing the policies developed by boards, while directors are responsible for developing and implementing program policies. Among other features, the study recommended no

salary increases. It would be helpful for the Committees to understand the role that this report has played in continued review of salary increase requests and whether DCA agreed with its findings.

The Board of Pharmacy (BOP) president noted at its July 2017 meeting that California is the largest board of pharmacy in the nation (with more staff and more licensees than other boards) with over 140,000 licensees spread out among over more than 25 categories of licensure. In a salary survey conducted by the National Boards of Pharmacy, it was identified that the California EO's salary is less than 42 percent of the nation's other EOs. Further, the Assistant Executive Officer receives only \$921 less annually than the EO – hardly a reason to seek promotion. BOP had previously requested adjusting the EO to the F level in 2015 but was only approved by the Administration for an increase to the G level. BOP voted at that July 2017 meeting to provide an increase to the D level, but the level increase was denied on February 12, 2018 when BOP's request was returned to DCA from Agency with no action taken. The California State Athletic Commission also received a presentation from DCA staff on the issue of EO salary increases. Commission members noted that only California's EO oversees a state-sponsored pension fund other than CalPERS as well as a neurological fund, is an arbitrator of legal matters and that California holds more events than most states yet the EO has a lower level of compensation than many other states' EOs with significantly less responsibility. In February 2017, the Board of Vocational Nurses and Psychiatric Technicians sought to increase the salary for its EO, similarly citing the comparison of California's population of licensees to other states, with the California BVNPT overseeing more licensees than any other state board.

Clearly boards desire to compensate EOs and work to retain EOs by providing competitive salaries. It would be helpful for the Committees to understand the current process for EO reviews, the current process for DCA review of and approval of EO salary increases approved by boards as well as any efforts DCA is undertaking to assist boards in retaining quality and qualified staff.

***Staff Recommendation: DCA should update the Committees on the current process for EO reviews, the current process for DCA review of and approval of EO salary increases approved by boards as well as any efforts DCA is undertaking to assist boards in retaining quality and qualified staff, including an update on DCA's "succession planning" efforts.***

**ISSUE #7: (EVIDENCE BASED GUIDELINES) Does the DCA or its licensing entities have generally applicable criteria for applying evidence-based principles to practice or education standards, particularly for the licensed health professions?**

**Background:** There has been disagreement over the use of the term "evidence-based" in statutory requirements for boards and other agencies. Even if regulators can easily determine the existence of supporting evidence on a given topic, the law may not be clear as to the extent they should consider variations in quantity and quality of the evidence.

For example, last year the Committees debated whether to require that nursing continuing education courses be "evidence-based" (SB 799 (Hill), Version 95, Amended May 26, 2017). The requirement was not included in the final bill, and one of the issues was the proper way to define "evidence-based" in that context.

Recently, the Board of Registered Nursing (BRN) discussed amending its regulations to address this issue.\* Instead of defining "evidence-based" for all courses, the BRN considered whether to exclude certain courses on the basis that they are not relevant to the practice of nursing. Specifically, the

amendment would define a course as not relevant if the course relates to an "experimental" procedure, unless the procedure is (1) supported by at least one peer-reviewed, publicly available, scientific journal or study, published in medical and scientific literature and (2) generally accepted as effective by the medical community.

However, that language may not work for other situations or boards. Therefore, it may be beneficial to look at the way evidence-based principles are used by other agencies, such as the California Health Benefits Review Program (CHBRP). CHBRP is a state agency that provides independent analysis of the medical effectiveness, cost impact, and public health impact of proposed health benefit mandates and repeals.

While CHBRP does not make recommendations, it utilizes principles of evidence-based medicine to establish findings that decision makers can act on. Basically, when performing a medical effectiveness analysis of a new health benefit, CHBRP reviews the available body of literature and rates the efficacy of the service based on the quantity and quality of evidence in either direction.

One option for the DCA then could be to modify the CHBRP approach to focus on consumer protection impact in place of (or in tandem with) efficacy, cost, and public health. That way, future statutory and regulatory requirements could point to an evidence-based standard.

Not Safe When Performed by Qualified Practitioners		Insufficient Evidence			Generally Safe for Qualified Practitioners	
Clear and Convincing	Preponderance	Limited	Inconclusive	Limited	Preponderance	Clear and Convincing

If a modified scale is agreed upon, statutes or regulations could require that a board may approve a procedure, or the procedure an educational course relates to, only if at least a preponderance of the evidence suggests the procedure is safe.

Alternatively, utilize available tools and guidelines, such as those provided by agencies within the U.S. Department of Health and Human Services, such as the National Information Center on Health Services Research and Health Care Technology (NICHSR) at the National Library of Medicine or the National Guideline Clearinghouse created by the U.S. Agency for Healthcare Research and Quality (AHRQ).

**Staff Recommendation:** *The DCA should discuss existing or potential efforts to develop generally applicable evidence-based standards or guidelines and any potential pitfalls or issues.*

**ISSUE #8: (BVNPT).** Tasked with regulating individuals who provide services and care to some of the most vulnerable patient populations in a wide range of settings, the Board of Vocational Nursing and Psychiatric Technicians (BVNPT) has faced challenges meeting its

**consumer protection mandate, struggled with administrative functions and has undergone program monitoring since 2016. What is the current status of BVNPT?**

**Background:** The BVNPT is responsible for administering the laws related to the education, practice and discipline of Licensed Vocational Nurses (LVNs) and Psychiatric Technicians (PTs). The BVNPT regulates over 120,000 LVNs and 11,000 PTs, the largest groups of LVNs and PTs in the nation. The BVNPT has 11 members, with a public member majority (six public members and five professional members). Nine members are appointed by the Governor, one by the Speaker of the Assembly and one by the Senate Committee on Rules. The majority of the current board members are newly appointed. The BVNPT's executive officer has recently been appointed by the Governor's office pursuant to recent legislation, AB 1229 (Low).

*Sunset Review 2015-2017.* In March of 2017, the BVNPT was one of the entities reviewed by the Assembly Business and Professions Committee and Senate Business Professions and Economic Development Committee (Committees) during its joint oversight hearings of several boards and bureaus under the DCA. The BVNPT was last reviewed in 2015. Due to the issues revealed during the 2015 review, the Committees recommended that the BVNPT be extended for only two years. Board's without outstanding issues are typically extended by four years, while a two-year extension allows the Committees to observe improvements and the implementation of recommended changes that are considered as immediately necessary.

In addition, the Committees recommended in 2015, among other things, that the DCA:  
1) review, through its internal audit unit, the BVNPT's financial needs, fee structure, budget, and expenditures; 2) conduct an investigation of the Board's enforcement program by its Division of Investigation (DOI); and 3) by March 1, 2016, appoint an administrative and enforcement program monitor for a 2-year period to monitor and evaluate the BVNPT's administrative process and disciplinary system and procedures and report to the Board, the DCA and the Legislature.

In March of 2017, the Committees conducted the BVNPT's supplemental review. The hearing focused on the outstanding issues identified by the DCA's DOI and by its internal operational audit, information provided in the program monitor's reports, complaints received from former and current staff, and from updates provided by the BVNPT.

*Investigation and Audit of the BVNPT by the DCA.* The Committees had received evidence that enforcement cases were being mishandled by the BVNPT and in March 2015, immediately requested that the DCA's DOI initiate an investigation into any improper or inappropriate activities by the Board staff and management. In April of 2015, it was found that enforcement cases (including complaints and investigations) were being mishandled, and that the Board's entire discipline process was very inconsistent and misguided. Shortly after the investigation began, the Board's Executive Officer, the Assistant Executive Officer and the Chief of Enforcement resigned. Recommendations were made by DOI for corrective action. The internal operational audit conducted by the DCA provided information regarding the Board's fund condition, budget projections, up-to-date audit information, and any efforts that had been made to improve program efficiencies. The audit indicated that there were a number of problems with operation and management of the BVNPT and had noted that although some corrective actions had been implemented that they were unable to fully implement all of them. (For further information on both the Investigation and Audit conducted by the DCA see the Background Paper for the BVNPT prepared in 2017 available at <http://sbp.senate.ca.gov/sites/sbp.senate.ca.gov/files/BVNPT%202017%20Background%20Paper.pdf>)

*Administrative and Enforcement Program Monitor's Reports.* It was determined by the Committees that there were significant issues that needed to be addressed by the BVNPT, and because additional scrutiny was necessary, the Committees responded by recommending ongoing program monitoring by an Administrative and Enforcement Program Monitor (Monitor). Program monitoring usually includes one or more independent consultants who have expertise in the assessment of state agencies and provide a longer-term view of potential issues and is able to make recommendations to the Board, the DCA and the Legislature for improvements. In March of 2016, a program monitor was selected by the DCA.

The BVNPT's Monitor assisted the Committees in their 2017 review, providing information and producing extensive reports. The program monitor was tasked with observing and evaluating the BVNPT's administrative processes and the BVNPT's disciplinary system and procedures and to make recommendations to the BVNPT, the DCA, and the Legislature on ways the programs could be improved. (For further information on the Monitor's reports see Background Paper for the BVNPT prepared in 2017 available at <http://sbp.senate.ca.gov/sites/sbp.senate.ca.gov/files/BVNPT%202017%20Background%20Paper.pdf>)

During this 2017 review, the BVNPT appeared to be making some improvements beginning in April of 2015. However, when a new Executive Officer (EO) was chosen in 2016, the relationship with the Monitor became strained and both the Board and the EO began to reject recommendations from the Monitor and staff of the Committees, even though many necessary changes were still outstanding. While recommendations are open to debate, the BVNPT's specific reasons for rejecting these recommendations were often questionable. Further, many new problems were raised, including:

- High staff vacancy rates and loss of key personnel, including management and division chiefs. While the reason is not clear, it appears to be related to staff morale and complaints regarding the poor and abusive treatment of staff.
- Inadequate utilization of the BVNPT's committee structure.
- Delays in adopting important performance measurements for its Enforcement Program.
- Lack of updating desk procedures, policies and procedures.
- Delays in providing the public BVNPT meeting minutes.
- Delays in approving educational programs, including a moratorium on approving school applications for almost two years because of a backlog in approving applications.
- Initiation of an extensive continuing education compliance audit of over 56,000 of its licensees (almost 50 percent of its licensee population) that significantly increased staff workload without any consideration of feasibility.
- Insufficient justification for attempting to change education requirements that could negatively impact those seeking licensure.
- Lack of further changes or progress in complaint handling, investigation of cases, or completion of disciplinary action. Further, the monitor raised concerns about cases being

improperly handled and not sufficiently investigated as a means of giving the appearance that the BVNPT was moving through cases rapidly and that there was no backlog of pending cases.

At the time, several board members questioned the existence of these issues. During the Sunset Hearing, several board members were even surprised to hear about the staff morale issues and complaints about the treatment of staff. However, after the hearing, there seemed to be some acknowledgement of potential issues and at least one individual board member proactively sought to implement some of the Committees' recommendations. However, the BVNPT is a deliberative body, and it did not appear as if the remaining board members were taking the necessary steps or actions necessary.

Further, in mid-July of 2017, the Monitor and the DCA discovered several new and serious issues, including:

- Automatically closing, at initial intake, without conducting any investigation all complaints that were submitted by persons who sought to remain anonymous and nearly all complaints submitted by inmates at correctional facilities, beginning late-2016. (It is unclear if this was an attempt to reduce backlogs.)
- Loss of tracking, monitoring, and control of criminal arrest cases which were awaiting criminal adjudication.
- Shelving of more than 100 completed investigation cases, most of which involved serious criminal misconduct or significant patient harm that had been investigated by sworn peace officers, without further action.
- Cessation of all citation issuances along with other citation program functions, beginning with the separation of BVNPT's citation desk analyst in May 2017.
- Discontinuation of critical enforcement program statistical data capture and reporting of quality control processes.

Given the seriousness of the cases that were shelved or were closed without investigation, the DCA's DOI intervened to contain and reduce the impact of these problems. Further, the BVNPT's enforcement division as a whole had lost multiple supervisors and institutional knowledge.

This, along with the outstanding issues identified in the Committees' background papers, suggests that the BVNPT continued to experience significant problems that impact its overall functioning, the oversight of licensees, and protection of the public. It was found by the Committees that the BVNPT was not focusing on the tasks at hand and in addressing issues and problems that needed immediate attention.

Due to the immediate need to at least address staffing concerns and their well-being, as well as potential issues concerning the management and operations of the Board, in particular its enforcement

program, it was evident that this Board required immediate oversight and direction from the Legislature, the DCA and the Governor.

*AB 1229 (Low, Chapter 586, Statutes of 2017).* The initial recommendations from Committees included removing the current board members and replacing them with new appointees or converting the BVNPT into a bureau for a short period of time. However, the current board membership is already relatively new, and it may be difficult to judge the BVNPT's ability and willingness to ask for help where needed without the opportunity to make decisions on its own.

The current language reflected in AB 1229 allows the BVNPT to continue, but with certain restrictions and requirements relating to its licensing and enforcement programs. These include more involvement and oversight by the DCA and its DOI. DOI is authorized to continue to provide significant resources to assist the BVNPT with management of its enforcement program and implementation of the Monitor's recommendations and other improvements.

It also grants authority to the Governor to appoint a new EO. The BVNPT has had four EOs since 2014, two of which were interim EOs. An interim EO had been in place since late January of 2017 when the prior EO was placed on administrative leave for legal reasons. In December 2017, the BVNPT decided to appoint the interim EO as the BVNPT's permanent EO.

In late-December, the Governor appointed a new EO for the BVNPT. The new EO began work at BVNPT on January 22, 2018. Additionally, the DCA provided the BVNPT with an Acting EO from January 1, 2018 through January 21, 2018. Since January 22, 2018, the Acting EO has also served as an Acting Assistant EO for the BVNPT pending selection and on-boarding of a permanent Assistant EO, a key position that has not been filled on a permanent basis for nearly 3 years.

The bill also extends the BVNPT for three years. The first two years provide the authority and oversight to provide a period to rebuild. In the third year, DCA's duties return to normal and the executive officer authority is transferred back to the BVNPT. The third year will coincide with sunset review and provide the opportunity to observe the BVNPT under existing law.

**Staff Recommendation:** *The DCA and the BVNPT should update the Committees on the status of the BVNPT.*

# CURRENT ISSUES FOR THE DEPARTMENT OF JUSTICE AND ATTORNEY GENERAL

**ISSUE #9: (BPC SECTION 312.2 REPORT) Pursuant to Business and Professions Code § 312.2, the Department of Justice (DOJ) recently began reporting data relating to the Attorney General’s legal representation of licensing entities under the DCA. This new report includes aggregate data relating to prosecutions resulting from accusations made against DCA licensees. How do the DOJ and DCA plan to incorporate this new statistical information into joint efforts to improve case timelines and ensure that complaints against professional license holders are adjudicated promptly?**

**Background:** As noted above, the Office of the Attorney General (OAG) acts as the attorney of record for DCA licensing entities in their administrative actions relating to a license. (Licensees of the Medical Board of California (MBC) and the boards MBC provides enforcement services to follow a process under a Vertical Enforcement and Prosecution model in which the Health Quality Investigation Unit investigator and OAG attorney work together on a case from the outset, rather than OAG waiting for referral of a case following an investigation.) OAG attorneys determine whether there is sufficient evidence for an accusation and file this legal document on behalf of their client board or bureau, outlining the charges against a licensee and the violations of a practice act a licensee is accused of.

Senate Bill 467 (Hill, Chapter 656, Statutes of 2015) established a new reporting requirement for the Attorney General relating to legal services performed by the Health Quality Enforcement (HQE) Section and Licensing Section within the DOJ’s Civil Division. These sections are responsible for providing client representation in administrative proceedings brought by boards and bureaus under the DCA. HQE and Licensing deputy attorneys general (DAGs) serve as litigation counsel for each DCA entity in legal proceedings, including disciplinary hearings involving licensees. In the state’s ongoing assessment of what potential stages of the disciplinary process are most vulnerable to undue delays—which includes activities by the DOJ, DCA, and the Office of Administrative Hearings—this data should provide new valuable insight into questions of efficiency regarding the Attorney General’s role.

Beginning January 1, 2018, the Attorney General is now required to annually report the following information to the DCA, the Governor, and the appropriate policy committees of the Legislature relating to accusations:

- (1) The number of accusation matters referred to the Attorney General.
- (2) The number of accusation matters rejected for filing by the Attorney General.
- (3) The number of accusation matters for which further investigation was requested by the Attorney General.
- (4) The number of accusation matters for which further investigation was received by the Attorney General.
- (5) The number of accusations filed by each constituent entity.
- (6) The number of accusations a constituent entity withdraws.

(7) The number of accusation matters adjudicated by the Attorney General.

In addition to providing this statistical data on accusations, the DOJ is also required to report the following information on case timelines for the HQE and Licensing sections:

- (1) The average number of days from the Attorney General receiving an accusation referral to when an accusation is filed by the constituent entity.
- (2) The average number of days to prepare an accusation for a case that is rereferred to the Attorney General after further investigation is received by the Attorney General from a constituent entity or the Division of Investigation.
- (3) The average number of days from an agency filing an accusation to the Attorney General transmitting a stipulated settlement to the constituent entity.
- (4) The average number of days from an agency filing an accusation to the Attorney General transmitting a default decision to the constituent entity.
- (5) The average number of days from an agency filing an accusation to the Attorney General requesting a hearing date from the Office of Administrative Hearings.
- (6) The average number of days from the Attorney General's receipt of a hearing date from the Office of Administrative Hearings to the commencement of a hearing.

The first such report was submitted to the Legislature in December 2017. The data was accompanied by information about the Attorney General's litigation practices, what types of legal services are provided by the Attorney General to DCA entities, and what services are and are not included in the BPC § 312.2 reporting requirements. Information for purposes of the report was collected through an augmentation to the DOJ's Case Management System, which integrated the mandated data points into tailored data markers.

In light of the unique natures of each individual board or bureau, the data reported by the DOJ in their report was broken down into specific regulatory entities, with each count and average provided separately for each represented client. This enables to the DCA to incorporate current disciplinary process timeline factors into efforts by each individual client to act quickly to resolve complaints.

While future reporting will produce more reliable averages and provide greater detail into how much statistical deviation exists for each board and bureau's legal processes, the contents of the DOJ's report is immediately available for the DCA to incorporate into its efforts to expedite case resolution, particularly in regards to its disciplinary case timeline objectives under the Consumer Protection Enforcement Initiative (CPEI).

***Staff Recommendation:*** *The DCA should provide the Committees with information about what takeaways they have gathered from the DOJ's recent reporting under BPC § 312.2 and how they intend to use this data to empower existing efforts to improve case resolution timelines and promote the public protection mission of its boards and bureaus. The DOJ should also provide information about what internal protocols at the Attorney General's office are being adjusted in light of the new data gathering and how the DOJ intends to further its partnership with the DCA and the Office of Administrative Hearings to ensure that disciplinary proceedings are effectively and expediently pursued and resolved.*